

SOUTH AFRICA / JUDGMENT

Paarl Coldset (PTY LTD) v Singh (DA1/2021) [2022] ZALAC 98; (2022) 43 ILJ 2010 (LAC); [2022] 10 BLLR 920 (LAC) (2 June 2022)

[2022] ZALAC 98

COURT

Labour Appeal Court

BEFORE

Phatshoane, Savage, Phatudi

CASE / FILE NUMBER

DA1/2021

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IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Not Reportable

Case no: DA1/2021

In the matter between:

PAARL COLDSET (PTY LTD)

Appellant

and

SIRSINGH SINGH

Respondent

Heard:

15 March 2022

Delivered: 02 June 2022

Coram:

Phatshoane ADJP, Savage and Phatudi AJJA

Judgment

SAVAGE AJA

- [1] This appeal, with the leave of the Labour Court, is against the judgment and orders of the Labour Court (Gush J) delivered on 10 November 2020 in terms of which the award of the arbitrator, issued under the auspices of the Statutory Council for the Printing, Newspaper and Packaging Industries ('the Council'), was set aside on review and the respondent, Mr Sirsingh Singh, reinstated into his employment with the appellant, Paarl Coldset (Pty) Ltd. The respondent cross-appeals against the order of reinstatement, only to the extent that he urged that the reinstatement be retrospective up until the date on which he would have been retrenched when the appellant closed its Pietermaritzburg operation, where he was employed. In the alternative, if reinstatement is found not to be reasonably practicable, the respondent seeks 12 months' compensation for his unfair dismissal.
- [2] The respondent was employed as a shift manager by the appellant, a business engaged in the printing of newspapers. Portions of the premises occupied by the appellant were leased to other companies, including Media24. On 21 September 2016, at approximately 06h00, after completing his shift, the respondent exited the appellant's premises by driving down a one-way lane designated for traffic entering the premises. To avoid colliding with an oncoming vehicle and so as to allow that vehicle to pass, the respondent was forced to move his vehicle backwards. The driver of the oncoming vehicle, who was the son of Ms Charmaine Cassim, an employee of Media24, told the respondent he was driving in a "no entry zone". While Ms Cassim was getting out of the vehicle driven by her son, the respondent drove his vehicle at speed towards them, behaved in an aggressive and intimidatory manner towards the Cassims and swore at them. He is said to have pursued the Cassims. Parked next to their vehicle to continue with the argument.
- He alighted his vehicle while the Cassims remained in their vehicle. He used offensive language and intimidated Mr Cassim which conduct brought Ms Cassim to tears. Angered by his conduct, Ms Cassim reported the incident to the appellant's management the same day which prompted an investigation into the incident.
- [3] At a disciplinary hearing held on 5 October 2016, the respondent was found to have failed to adhere to safety regulations, with potentially serious consequences, and to have resorted to violence or intimidation in approaching and intimidating the Cassims. This conduct was found to have impacted negatively on the appellant and brought it into disrepute with its tenants.
- [4] The respondent did not deny his misconduct. He admitted that he had driven down the one-way road and that he had sworn at the Cassims during the incident. The chairperson of the disciplinary hearing found that the respondent had purposefully escalated the conflict by confronting the Cassims in an aggressive and threatening manner. From CCTV footage it was apparent that he had pulled his vehicle unnecessarily close to Ms Cassim's vehicle in what appeared to be an aggressive attempt to intimidate or harass them. The disciplinary hearing chairperson rejected the respondent's attempt to lay blame on the Cassims. In recommending an appropriate sanction, the chairperson stated that:

‘I note that these offences are very serious and could possibly warrant dismissal. I have however taken into account the employee’s 33 years’ service and his clean disciplinary record and the fact that coming off night shift, he was possibly tired and may have been in shock after the near-collision. I have also noted his expression of intent to reconcile with Mrs Cassim and her son. I, therefore, believe that the mitigating factors are strong enough to reduce the sanction to a final written warning provided that Mr Singh gives Mrs Cassim and her son an apology and an undertaking to refrain from any further negative interactions with them.’

[5] This recommendation was duly implemented by the appellant. On 13 October 2016, the respondent emailed his line manager, Mr Shaun Coleman, stating:

‘Please note as per the chairperson’s recommendation I S. Singh do hereby and without prejudice do humbly apologise unconditionally to Charmaine and her son with regards to the incident that occurred in the driveway on the 21st September 2016.’

[6] Mr Coleman suggested changes to the apology and it was agreed with the respondent that he would personally tender the apology at a meeting with the Cassims, which was to be arranged by Mr Coleman. On 17 October 2016, the Cassims attended at the appellant’s offices for this purpose. However, the respondent arrived 20 minutes late for the meeting, did not make any eye contact with the Cassims and when requested to apologise to them, refused to do so on the basis that he had obtained legal advice and would appeal the ruling. The Cassims left the meeting irate. Later that day, the respondent informed Mr Coleman that his apology to the Cassims did not have to wait the outcome of the appeal and that he would keep his promise to make the apology at their convenience. In due course, the respondent lodged an appeal against the disciplinary findings and sanction imposed by the appellant, which appeal he was advised on 26 October 2016 had been unsuccessful. No apology to the Cassims was made.

[7] The appellant took further disciplinary action against the respondent following his conduct at the meeting with the Cassims on 17 October 2016 on the basis that his conduct had impacted negatively on the appellant since the Cassims had attended the meeting to receive the apology, but the respondent had refused to apologise which had escalated the conflict and brought the appellant into disrepute. At the second disciplinary hearing held on 8 November 2016, the appellant contended that the respondent’s conduct had amounted to a breach of the trust relationship in that although he had confirmed that he would apologise verbally and sent an email to this effect, in accordance with the outcome of the first disciplinary hearing, when given the opportunity he had refused to do so.

[8] The chairperson found that the respondent had contravened the appellant’s standard of trust and that given his supervisory role he was aware of the conduct required of him and the importance of upholding the image of the appellant. It was found that the aggravating factors outweighed those submitted in mitigation and that dismissal was the appropriate sanction.

Arbitration award

- [9] Dissatisfied with his dismissal, the respondent referred an unfair dismissal dispute to the Council. The arbitrator found that the respondent was aware that the condition attached to the final written warning was that he apologises to Ms Cassim and her son. After he had emailed the draft apology to Mr Coleman, which indicated his intention to apologise, a meeting was arranged with the Cassims. The arbitrator accepted Mr Coleman's evidence that the respondent had agreed to the meeting being set up with the Cassims to allow him to apologise to them. On his late arrival at the meeting, the arbitrator noted that the respondent ignored the Cassims, refused to make eye contact with them, did not greet them and proceeded to inform Mr Coleman that on the basis of the legal advice he had received, he would only apologise after the outcome of the appeal process. The Cassims left the meeting irate and expressed their strong dissatisfaction to the appellant with what had occurred.
- [10] The arbitrator found that the respondent's statement that he had not known about the meeting with the Cassims was not put to Mr Coleman and was "highly suspicious considering that he wrote an e-mail to Coleman indicating what his apology would be". The respondent was found to have tailored his evidence as he went along, with Mr Coleman's evidence found more probable than that of the respondent. The arbitrator took the view that Mr Coleman had no interest in setting up a meeting to humiliate the respondent, as had been alleged by the respondent, and that it was more plausible that he had wanted to assist the respondent. The respondent was found to have "had second thoughts about the apology" and to have escalated the dispute at the meeting with the Cassims. When the respondent later indicated that he wished to apologise, the Cassims were unsurprisingly not interested. Through his conduct, the arbitrator found that the respondent, despite being given the opportunity to apologise, had "embarked on a route that simply aggravated the already existing dispute".
- [11] This led the arbitrator to conclude that given his conduct, the appellant was entitled to take further disciplinary action against the respondent, who was the "author of his own fate". Until the date of arbitration, the respondent had not apologised for his conduct which impacted on the trust relationship. The dismissal was therefore found to have been substantively fair, with the respondent's years of service neither amounting to a licence to commit misconduct with impunity nor providing sufficient reason to interfere with the sanction imposed by the appellant.

Judgment

of the Labour Court

- [12] Aggrieved with the findings of the arbitrator, the respondent sought the review of the arbitration award by the Labour Court. The Court took the view that there was no evidence that the Cassims were dissatisfied with the appellant or that the respondent's refusal to

apologise to them had impacted negatively on the appellant. This was so despite the Court's finding that the respondent had written an apology and agreed to attend the meeting with the Cassims. Although it was found that it was "without question" that "there was some degree of culpability or misconduct on the part of the [respondent] resulting from his failure to tender an apology", the respondent had taken legal advice and indicated that he would only apologise after the appeal. The Court took the view that the Cassims' anger was directed only at the respondent and that the failure to render an apology did not bring the appellant into disrepute and did not constitute conduct which warranted dismissal given the circumstances of the matter and the respondent's length of service.

- [13] The sanction imposed was found to be "unnecessarily harsh" and the award was set aside. Since the Court stated that it was not in a position to substitute or prescribe an appropriate sanction for the misconduct committed, it noted that nothing prevented the appellant from imposing an appropriate sanction on the respondent's return to work. The arbitration award was therefore set aside and substituted with the order that the respondent be reinstated into his previous position with the appellant.

Submissions

on appeal

- [14] It was argued for the appellant that "(p)rovided the right question was asked and answered by the arbitrator, a wrong answer

will not necessarily be unreasonable".[1] Placing reliance on the decision of this Court in *Timothy v Nampak Corrugated Containers (Pty) Ltd (Timothy)*[2] it was argued that determining whether the appellant company had been brought into disrepute by the conduct of the respondent required all the circumstances, the nature of the conduct, its turpitude and seriousness of it, to be considered objectively. The circumstances

indicated that the respondent had broken the duty of trust by bringing the appellant into disrepute in refusing to apologise to the Cassims for his conduct; and that given the impact of his conduct on the appellant and his prior disciplinary warning, the decision to dismiss him was appropriate and fair.

- [15] Counsel for the respondent strongly disputed that the misconduct committed by the respondent was of a serious nature. During argument before us, the respondent's behaviour was somewhat downplayed with it submitted that it did not warrant dismissal. In addition, it was argued that to dismiss the respondent after 33 years' service because of a "spat in a driveway" after the "utter mishandling of the disciplinary process" offended against any reasonable person's sense of justice and equity. Although it was accepted that the Labour Court did not expressly state that the decision reached by the arbitrator was one that a reasonable decision-maker could not reach, it was argued that it effectively found as much. It was suggested that the respondent's refusal to apologise to the Cassims on 17 October 2016 was correctly viewed by the Court as a qualified refusal. The arbitrator failed to appreciate

that the conduct did not bring the appellant into disrepute and it was stated that the arbitration award was neither rational, nor reasonable, and the decision to dismiss was unnecessarily harsh and inducing a sense of shock. As a result, the arbitration award fell to be set aside. Since reinstatement is the primary remedy, it was appropriate to reinstate the respondent although the order of reinstatement should properly have been clarified by the Labour Court to make it clear that it was retrospective up to the date the respondent would have been retrenched. In the alternative, an order of compensation was sought in the amount of R432 000,00, being the equivalent to 12 months' remuneration.

Evaluation

[16] In *Herholdt v Nedbank Ltd* (Congress of South African Trade Unions as Amicus Curiae),[3] it was held that a review of an arbitration award is permissible if the defect in the proceedings falls within one of the grounds in section 145(2)(a) of the LRA:

'For a defect in the conduct of the proceedings to have amounted to a gross irregularity as contemplated by Section 145(2)(a)(ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only be unreasonable

if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.'

[17] The Labour Court treated the review application which came before it as an appeal and not a review. The Court failed to have regard to whether the decision of the arbitrator was one to which a reasonable arbitrator could not reach in the manner contemplated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (Sidumo).[5] The submission made on behalf of the respondent that although the Court did not expressly state that the decision reached by the

arbitrator was one that a reasonable decision-maker could not reach, it effectively found as much, is simply not sustainable having regard to the reasoning and judgment of the Court. There is no mention made by the Court of the test against which it was required to consider the award, nor of the reasonableness or otherwise of the decision of the arbitrator. It cannot, therefore, be implied that the Court undertook the review on the basis required when the approach and language of the Court suggests the contrary. As a consequence, the approach of the Labour Court to the review of the award was plainly incorrect with the result that the decision of the Court is one that cannot be sustained on appeal.

[18] In undertaking the task impartially, an arbitrator is required to take into account the totality of circumstances. As was made clear in *Sidumo*,[6] this includes the importance of the rule that had been breached, the reason the employer imposed the sanction of dismissal, the basis of the challenge to the fairness of the dismissal:

‘There are other factors that will require consideration. For example, the harm caused by the employee’s conduct, whether additional

training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list.’

[19] Remarkably, the respondent refused, even in this appeal, to accept the seriousness of his misconduct and its impact on either the Cassims or his employment relationship with the appellant. The clear evidence was that as an older man, the respondent had misconducted himself in a patently unacceptable, unwarranted, threatening, abusive and intimidatory manner towards a woman and her son within the confines of the appellant’s premises without any justification. Nevertheless, in spite of the seriousness of that misconduct, the appellant elected to implement progressive discipline providing the respondent with a final written warning on the basis that he apologises to the Cassims given his extensive years of service with the appellant and clean disciplinary record.

[20] The respondent initially appeared to accept the sanction imposed on him, drafted an apology to the Cassims for his behaviour and agreed to meet with them to tender such apology. However, instead of doing so, the respondent made his disdain for the meeting, called at his instance, evident from the fact that he arrived 20 minutes late, without explanation or apology. He then refused to apologise, which conduct was patently rude to the Cassims, who were under no obligation to attend the meeting and left it outraged at the treatment received from the respondent. In behaving as he did, the respondent was disrespectful to both the Cassims and the appellant. This amounted to a refusal to comply with the first disciplinary sanction imposed despite the appellant and the Cassims having acted on his prior indication that he would do so and apologise. Furthermore, his refusal to take responsibility for his actions and the manner of his hostile response to the Cassims at the meeting arose in circumstances in which he had received a final written warning for similar misconduct.

[21] In Timothy[7] this Court made it clear that progressive discipline is –

‘designed to bring the employee back into the fold, so as to ensure, by virtue of the particular sanction, that faced with the same situation again, an employee would resist the commission of the wrongdoing upon which act the sanction was imposed’.

[22] Far from taking heed of the final written warning that had been imposed on him, in refusing to apologise and behaving as he did, the respondent chose not to comply with the terms of the sanction imposed and engaged in misconduct similar to that previously committed. Even if the appellant had obtained legal advice to appeal the first disciplinary sanction, this did not justify his conduct either in agreeing to have the Cassims invited to attend the meeting to allow him to apologise to them or in his adopting the hostile approach that he did to them at the meeting. In conducting himself as he did the respondent’s conduct had a direct impact on his employment relationship. This was so in that in the face of the opportunity given to him to remediate his behaviour and apologise for it, he refused to do either. The

appellant was not obliged either to accept or overlook such repeated misconduct on the part of the respondent, nor to extend any further leniency to him when he had refused to remediate his behaviour. In these circumstances, dismissal was an appropriate operational response to the repeated misconduct committed by him, despite his long service and clean disciplinary record. The decision of the arbitrator that the dismissal of the respondent was fair fell within

the ambit of reasonableness required. The Labour Court ought properly, on application of the proper test, to have found as much on review.

[23] For these reasons the appeal must succeed. There is no reason in law or fairness why costs should be awarded in the matter.

Order

[24] The following order is therefore made:

1. The appeal succeeds.
2. The order of the Labour Court is set aside and substituted as follows:

“The review application is dismissed.”

Savage AJA

Phatshoane ADJP agrees.

PHATUDI AJA

[25] I have had an opportunity to read the judgment penned by my colleague Savage AJA, (main judgment) and am appreciative for her valuable recital of the factual matrix in this matter. Savage AJA concludes that the appeal against the decision of the Labour Court (“court a quo”) must succeed. I am, however, unable to agree with the outcome in particular, that the appeal succeeds, and therefore, resulting in the dismissal of the review application. That outcome effectively, has an adverse impact consequential on the sanction imposed, namely, dismissal of the respondent. It is strictly on the dismissal of the respondent that I have difficulty, for the

reasons

that follow:

[25.1] At the conclusion of the disciplinary hearing, the chairperson with regard to the sanction stated, among others that:

‘I note that these offences are very serious and could possibly warrant dismissal. I, have however, taken into account the employee’s

33 years’ service and his clean disciplinary record---

I have also noted his expression of intent to reconcile with Mrs. Cassim and her son. I, therefore, believe that the mitigating factors are strong enough to reduce the sanction to a final written warning, provided that Mr Singh gives Mrs Cassim and her son apology and an undertaking to refrain from any further negative interactions with them.’ (Emphasis added)

[25.2] Properly analysed, the following interpretations emerge from part of the sanction:

[25.2.1] The chairperson took into account the respondent’s 33 years of service and his clean disciplinary record;

[25.2.2] Noted the employees’ (Mr Singh) expression of intent to apologise to Mrs Cassim and her son;

[25.2.3] That, the sanction be reduced to “a final written warning”, provided that;

[25.2.4] The respondent (Mr Singh) tenders an “apology” to the Cassims.

[26] Crucially, it was at the first disciplinary hearing that the chairperson noted Mr Singh’s expression of intent to reconcile with the complainants. The apology, needless to mention, was not specified by the chairperson as to when, where or how it was required to be conveyed by Mr Singh to the Cassims.

[27] Be that as it may, on 13 October 2016, in line with the chairperson’s recommendations, the respondent dispatched an email to his line manager Mr Coleman (“Coleman”) stating that:

‘Please note that as per the chairperson’s recommendations, I, S. Singh, do hereby and without prejudice do humbly apologise

unconditionally to Charmaine and her son with regards to the incident that occurred in the drive way on the 21st of September 2016.’

Coleman arranged a meeting at the workplace with the parties on 17 October 2016 where the respondent was expected to tender his apology verbally to the Cassims.

The analysis

[28] The view I take in this regard is that Singh did “humbly apologise” though “without prejudice” in his email dated 13 October 2016 to the Cassims. However, in the meeting Coleman called on 17 October, the respondent could not apologise as expected on the basis of legal advice he obtained from his attorneys and that he, in any event, intended to internally appeal the ruling. He did not flatly refuse to apologise.

[28.1] I do not understand this turn of events to warrant fresh prosecution of the charges preferred in the “second hearing” where Singh was eventually dismissed. Furthermore, his intention to vindicate his rights in order to exhaust internal remedies, is enshrined in the appellant’s Disciplinary Code and Procedures. (Paragraph 2.7.1) (“code”) To my mind, this is a proper platform to exercise his right to appeal, internally especially within the dies allowed by the said code. The respondent’s failure to apologise over and above his email sent beforehand,

should not have been construed as contemptuous refusal to do so. His inability or failure to verbally tender his apology in that meeting, could not, in my view, amount to a mala fide conduct intended to damage the appellant company's reputation. This is because the inter-personal impasse between the Cassims and Singh, was not casually linked to employer-employee relationship or a breach of trust in an employment set-up that could reasonably have caused reputational damage. The fact that the Cassims were irate by Singh's right to appeal, or that Coleman himself was left "embarrassed", was not a conduct which justified a dismissal.

[28.2] To demonstrate his genuineness, the respondent later on that day posted the second email to Coleman in terms of which he "apologised for not apologising" to the Cassims as directed. He was, therefore, contrite, and sought to atone himself.

[28.3] It was these developments that precipitated the institution by the appellant of the second charges of misconduct against the respondent. Failure or alleged refusal to apologise to anyone for

misconduct is in terms of section 4 of the appellant's Code, not listed as one of the offences that could possibly have a damaging effect on the appellant's reputation, nor cause to a breach of trust between the employer-employee relationship. This is simply because, among others:

[28.3.1] The appellant's company was not a party to the personal impasse between the Cassims and Singh;

[28.3.2] The misconduct (first charges) complaint of was laid not by the employer, but by Mrs Cassim, an employee of Media 24;

[28.3.3] It is inconceivable how the chairperson, therefore, could have reasonably causally connected that personal dispute to the company's reputation, nor a breach of trust (failure to apologise) between the appellant and Singh. There was therefore insufficient nexus for the appellant to have formulated the "second" charges.

[29] In the light of these considerations, the reasoning of the chairperson of the "second" hearing stating that the respondent's conduct has "impacted negatively on the company with a client and tenant resulting in the organisation being brought into disrepute, was, in my view, manifestly flawed. This is simply because the Cassims are not employees of the appellant nor its tenants, let alone its business associates. Furthermore, the fact that Coleman felt "embarrassed" by Singh's failure to apologise, I would say again, when no cogent evidence which allegedly damaged the reputation of the company was adduced, tainted or vitiated the outcome of that hearing.

[30] To that extent, the finding made by the court a quo that:

'The second respondent (arbitrator) patently failed to conclude from the evidence of the first respondent's witnesses themselves and the documentation that, firstly, the issue surrounding the apology was patently part of the outcome of the disciplinary inquiry...'

cannot be faulted.

It was this failure, in my view, that led the arbitrator astray arriving as he did, at a decision no reasonable decision-maker could reach.[8] The court a quo, therefore, correctly set aside the arbitration award since the nature and degree of the seriousness of the infraction, whatever one looks at it, could not have truly justified the dismissal in the circumstances.

[31] The observation I make above finds refuge in the passage from *Revelas J J in Toyota SA Manufacturing v Radebe & Others*[9] that;-

‘[18] However, these principles do not dictate that mitigating circumstances such as taken into account by the third respondent should influence the result or sanction that should be applied. In other words, dismissal is not knee-jerk response to all cases of dishonesty, without exception - - -

He took into account mitigating circumstances, presented on the evidence before him, and he found that sanction other than dismissal should be applicable in this matter.’ [emphasis added]

[32] I fully subscribe to the principle espoused in the foregoing passage that not every infraction, however serious in some instances it may be, that it should mechanically be seen to amount to knee-jerk response to all (mis)conduct particularly if it is not in any way destructive to the employer’s business operations. A decision-maker is, therefore, enjoined to consider, thoroughly, all relevant evidence placed before him/her in mitigation of sanction. In the instant matter, the chairperson (first hearing) had, in my view, correctly applied his mind to the mitigating circumstances presented by recommending a final written warning and directing that the respondent should offer his apology to the Cassims in relation to the “first” disciplinary hearing. This approach had undoubtedly placed him in a vintage view to select a fair and reasonable sanction as he did.

[33] It is trite principle that substantive fairness refers to a valid and fair reason to dismiss. Conversely, a valid reason is not per se fair.

‘A fair reason means that, considering all the circumstances, dismissal is the only appropriate sanction; no alternative sanction can be considered. It is generally accepted that dismissal is justified in circumstances as where the employment relationship has become intolerable or where the trust relationship between employer and employee has irretrievably broken down.[10]

[34] In the instant case, the chairperson of the “second hearing” did not live up to the above stated threshold as no substantive evidence was presented before him to justify the reasonableness of the dismissal. This view derives from the fact that: “Before the employer decides on dismissal, alternatives to dismissal should be considered. Is dismissal the only possible sanction, or will an alternative sanction be more appropriate in the circumstances? Mitigating circumstances must be considered before deciding on a sanction.”[11] A positive approach to discipline is required rather than a punitive one. The chairperson in the “second hearing” departed

from this norm without providing plausible reasons. This departure, in my view, constituted grave irregularity that the court a quo correctly redressed by setting aside the award.

[34.1] Furthermore, the reasoning of the chairperson of the “second hearing” in an attempt to justify the respondent’s dismissal, his subjective speculations for instance, that he was

“suspicious considering that he (Singh) wrote an email to Coleman indicating what his apology would be” or that Singh

“tailored his evidence” in the meanwhile since he was found to have “had second thoughts about the apology” and thus escalated the dispute at the meeting with Cassims that “embarked on a route that simply aggravated the already existing dispute”, were all assumptions of speculative conjecture, to say the least. There was no factual basis to support these far-fetched assumptions.

[34.2] To that end, the court a quo’s findings inter alia, that the angry attitude adopted by the Cassims after Singh failed (not refused) to apologise, was in relation to the refusal and that in itself could not tarnish the appellant’s reputation, were conclusions which, in my view, cannot be assailed on appeal. I agree that the sanction was found to be “unnecessarily harsh” given the mitigating factors, and the respondent’s unblemished record of clean service over three (3) decades loyal to the employers could not have been suddenly obliterated.

[34.3] Failure by the respondent to give an apology was not capricious. He

was desirous to exercise his right to exhaust internal remedies, namely, to appeal against his dismissal.

[35] Section 3(b) of the Labour Relations Act, 1995[12] (“the LRA”) requires that a person interpreting this Act must do so “in compliance with the Constitution”. The right to appeal internally in order to vindicate one’s labour law remedies must therefore, be in line with the Constitution and the LRA. In casu, such an inherent right to resolve “any dispute” that can be resolved by application of law before a court or, where

appropriate, another independent and impartial tribunal or forum, vests in section 34 of the Constitution.[13] The respondent have the right of recourse to this remedy. It is in the internal appeal forum constituted by the appellant which Singh sought to approach before he could tender apology to the Cassims on 17 October 2016. To have seen this right as a breach of the employer’s trust merely because Singh failed to apologise was, in my view, unreasonable, if not a violation of his right to fair labour practices and therefore, untenable.

[36] In *Timothy v Nampak Corrugated Containers (Pty) Ltd*, [14] this court stated that the decision whether conduct of an employee brought the company into disrepute requires all the circumstances, the nature of the conduct, its turpitude and seriousness of it, if any, to be considered objectively. The chairman of the second hearing, once again, failed to consider the objective factors referred to, before he could impose dismissal as a sanction.

Conclusion

[37] I have in reaching my dissent on dismissal of Singh, where appropriate alternative sanction was available at the employer's disposal, largely deferred to the guidance in *Booi v Amathole District Municipality & Others*[15] where the Constitutional Court in analysing the purpose of section 193(2)(b) of the LRA, also gave a detailed exposition of the high bar of "intolerability", implying a "level of unbearability", short of the working relationship that is thought "difficult, fraught or even sour". The view expressed by Khampepe ADCJ in *Booi*, she said, was fortified by the jurisprudence of the Labour Appeal Court, and the Labour Court, both of which "have taken the view that the conclusion of intolerability should not be easily reached, and that the employer must provide weighty reasons, accompanied by tangible evidence, to show intolerability". This salutary approach was absent at the latter hearing of the disciplinary enquiry. It could not even have escaped my attention that "intolerability"

at the workplace or work relationship should not be confused with mere "incompatibility" between the parties.

This is what, in my opinion, the chairperson did not bear in mind before the dismissal was sanctioned at the "second hearing."

[38] On a conspectus of all of the foregoing considerations, the conclusion I reach is that the decision of the commissioner was correctly set aside by the court below. Therefore, I would have dismissed the appeal with no order as to costs, and substituted an order of reinstatement made by the Labour Court with an order that of compensation.

[39] In the result, I would propose that the appellant, (Paar Goldset (Pty) Ltd) or its successor in-title be ordered to pay the respondent (Mr Sir Singh) compensation in the amount of R432 000.00, being equivalent of twelve

(12) months remuneration.

MG Phatudi

Acting Judge of the Labour Appeal Court

APPEARANCES:

FOR APPELLANT: G A Fourie SC

Instructed by Crawford & Associates

FOR RESPONDENT: P J Blomkamp SC

Instructed by Vather Attorneys

[1] *Head of the Department of Education v Mofokeng and others* [2015] 1 BLLR 50 (LAC) at para 33.

[2] [2010] ZALAC 29; [2010] 8 BLLR 830 (LAC); (2010) 31 ILJ 1844 (LAC).

- [3] 2013
- (6) SA 224 (SCA); [2013] 11 BLLR 1074 (SCA); (2013) 34 ILJ 2795 (SCA).
- [4] At para 25.
- [5] Sidumo and Another v Rustenburg Platinum Mines Ltd and Others [2007] ZACC 22; [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC) ; (2007) 28 ILJ 2405 (CC)[2007] ZACC 22; ; 2008 (2) BCLR 158 (CC) with reference to Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others
- [2004] ZACC 15; 2004
- (4) SA 490 (CC); 2004 (7) BCLR 687 (CC).
- [6] At para 78.
- [7] [2010] ZALAC 29; [2010] 8 BLLR 830 (LAC); (2010) 31 ILJ 1844 (LAC) at 1850.
- [8]Carephone (pty) ltd v Marcus N.O & Others 1999
- (3) SA 304 (LAC) at para [37]. See also, Sidumo & Another v Rustenburg Platinum Mines Ltd and Others 2008
- (2) SA 24 (CC) at paras [106-110].
- [9] Toyota SA Manufacturing v Radebe & Others (1998) 19 ILJ 1610 (LC), para [18].
- [10] Du Plessis J V & Fouche M A, A practical guide to Labour Law (Lexis Nexus 9th ed 2019) p348.
- [11] Ibid p 348.
- [12] Act 66 of 1995, as amended.
- [13] The Constitution of the RSA, 1996, as amended.
- [14] [2010] ZALAC 29; [2010] 8 BLLR 830 (LAC).
- [15] 2022
- (3) BCLR 265 (CC); (2022) 43 ILJ 91 (CC) para [40].

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Prepared on 11 October 2026 · Esheria